



Litigation Update

Litigation Section News

February 2007

Mediation settlement inadmissible unless conditions are met.

Evid. Code §1119 provides that writings prepared for and comments made during mediation may not be used in evidence. What about a settlement that was reached during mediation? *Evid. Code* §1123 provides that a written settlement agreement prepared in the course of, or pursuant to mediation, may be admitted, provided the document expressly states that it is admissible or subject to disclosure, provides that it is enforceable or binding, the parties agree to its disclosure, or the agreement is used

to show fraud, duress, or illegality. [Check the statute for the exact language.] In *Fair v. Bakhtiari* (Cal. Supr. Ct.; December 14, 2006) 40 Cal.4th 189, [2006 DJDAR 16184], our Supreme Court strictly construed the statute and denied permission to show that the parties intended for a settlement agreement executed during mediation, to be binding by the use of other evidence produced at the mediation. The conditions articulated in *Evid. Code* §1123 must appear on the face of the settlement agreement.

No punitive damages absent evidence of defendant's financial condition.

Where the trial court assessed punitive damages without receiving evidence of defendant's financial condition, the award was reversed. Absent such evidence, there is insufficient substantial evidence to support the award. *Kelly v. Haag* (Cal. App. Fourth Dist., Div. 1; November 22, 2006; ord. pub. December 15, 2006) 145 Cal.App.4th 910, [2006 DJDAR 16269].

No default judgment unless complaint specifies damages.

Code Civ. Proc. §425.10 prohibits complaints in personal injury and wrongful death cases to include the amount of damages. To satisfy due process by giving the defendant notice of the amount sought, *Code Civ. Proc.* §425.11 provides that a separate statement of damages must be served in these cases before a valid default judgment may be obtained. (See, Weil & Brown, *California Civil Procedure Before Trial*, TRG, ¶¶ 5:81 ff.) But this *only applies* in personal injury and wrongful death cases. In other cases, the complaint must specify the amount of damages sought before a valid default judgment may be entered and a separate statement of damages does not suffice. *Levine v. Smith* (Cal. App. Second Dist., Div. 6; December

18, 2006) 145 Cal.App.4th 1131 [2006 DJDAR 16410].

All discovery is stayed pending resolution of an anti-SLAPP motion.

In *Britts v. Sup.Ct. (Berg & Berg Enterprises)* (Cal. App. Sixth Dist.; December 18, 2006) 145 Cal.App.4th 1112 [2006 DJDAR 16426], the trial court granted a motion to compel responses to discovery while an anti-SLAPP motion (*Code Civ. Proc.* §425.16) was pending. The Court of Appeal issued a writ, holding that the pendency of the anti-SLAPP motion stayed *all* discovery, including pending motions relating thereto.

Legislature may not revive dismissed case by amending statute of limitations.

Plaintiffs' cases for childhood sexual abuse were dismissed in 1994 and 1995 under the then applicable one-year statute of limitations. Subsequently the legislature expanded the statute of limitations and plaintiffs sued again. The trial court dismissed the new suit. The Court of Appeal affirmed. The statute purporting to revive their *previously dismissed* complaint violated California's constitutional separation of powers doctrine. *Perez v. Roe* (Cal. App. Second Dist., Div. 8; December 27, 2006) 146 Cal.App.4th 171 [2006 DJDAR 16927].

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, [click here](http://www.surveyconsole.com/console/takesurvey?id=195323) or paste this web address into your web-browser: <http://www.surveyconsole.com/console/takesurvey?id=195323>

Your participation is important and greatly appreciated.

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at <http://members.calbar.ca.gov/discuss>

Arbitration claims are not subject to anti-SLAPP statute.

The anti-SLAPP statute (*Code Civ. Proc.* §425.16) applies only to judicial proceedings. The trial court erred when it applied the statute to a matter pending in an arbitral forum. *Sheppard v. Lightpost Museum Fund* (Cal. App. Sixth Dist.; December 29, 2006) 146 Cal.App.4th 315 [2007 DJDAR 84].

Court cannot order party to pay for private mediation.

Code Civ. Proc. §639 empowers the court to appoint a referee to examine a long account, take an account, and obtain information in a special proceeding. The

court may also appoint a referee to conduct a mandatory settlement conference. *Lu v. Sup.Ct. (Grand Lincoln Village Homeowner Ass'n)* (1997) 55 Cal.App.4th 1264, [64 Cal.Rptr.2d 561, 97 DJDAR 7763]. But, in *Jeld-Wen, Inc. v. Sup.Ct. (Marlborough Development Corp.)* (Cal. App. Fourth Dist., Div. 1; January 1, 2007) [2007 DJDAR 233], the Court of Appeal held that the court lacks the power to order parties to pay for and attend mediation before a private mediator. Unfortunately, the opinion makes no attempt to define the difference between a settlement conference and a mediation.

California Rules of Court have been renumbered.

Effective January 1, 2007, all *California Rules of Court* have been renumbered and re-organized. Cross-reference tables are available from major legal publishers. Although most of the rules are unchanged, there are some changes so it is necessary to check the newly renumbered rules to make sure there is no change except in the rule number.

Similarly, the Administrative Office of the Courts is renumbering all official court forms. As of this writing, this has only been partially accomplished and no single cross-reference publication is available.

We are sure that these changes were not made primarily to provide work for our paralegals, but, we find it difficult to imagine any other reason.

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

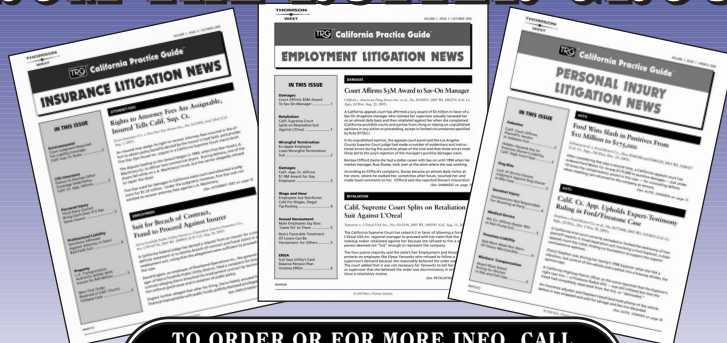
Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with.

Go to:

<http://members.calbar.ca.gov/discuss> to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

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